

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

PAMELA J. HOUK)	
Claimant)	
VS.)	
)	
COMMUNITY LIVING OPPORTUNITY)	Docket No. 189,952
Respondent)	
AND)	
)	
CIGNA WORKERS COMPENSATION)	
Insurance Carrier)	
AND)	
)	
WORKERS COMPENSATION FUND)	

ORDER

Claimant appealed Administrative Law Judge Jon L. Frobish's March 5, 1998 Award. On October 28, 1998, the Appeals Board heard oral argument in Topeka, Kansas.

APPEARANCES

Claimant appeared by her attorney, Eugene C. Riling, of Lawrence, Kansas. Respondent and its insurance carrier appeared by their attorney, Michael W. Downing of Kansas City, Missouri. The Kansas Workers Compensation Fund (Fund) appeared by its attorney, Jeffery K. Cooper of Topeka, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and has adopted the stipulations listed in the Award.

ISSUES

The claimant challenges the Administrative Law Judge's conclusion that claimant is limited to a 15 percent permanent partial disability award based on her stipulated permanent functional impairment rating. Claimant contends she is entitled to a much higher work disability award because her work-related cervical injury has limited her to half-time employment.

Respondent and the Fund both contend claimant is not entitled to a permanent partial disability award because the Administrative Law Judge found claimant's work-related accident only resulted in claimant sustaining a temporary and not a permanent injury. Accordingly, respondent and the Fund argue claimant's award is limited to medical treatment and temporary total disability compensation for the resulting temporary condition.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board finds as follows:

FINDINGS OF FACT

- (1) On the date of claimant's accident, November 22, 1993, claimant was employed by the respondent as a teacher/counselor.
- (2) Claimant had been employed by the respondent since August 17, 1991, with job responsibilities of teaching handicapped adults to perform the daily living activities required for a person to live independently.
- (3) Claimant was injured when she stepped out in the hallway from taking a client to the bathroom. A male client was running down the hallway and forcibly pushed claimant in the back and into a wall. Claimant suffered injuries to her right forearm and to her neck.
- (4) Claimant was taken to Lawrence Memorial Hospital Occupation Health Clinic, where she was seen by Michael Geist, M.D. Dr. Geist also treated her two additional times with the last time being December 13, 1993. He wrapped claimant's right forearm and also placed it in a sling. She was given pain medication for her neck pain.
- (5) Before this accident, claimant had two previous cervical spinal injuries. She had a car accident in 1986. At that time, she was treated by orthopedic surgeon, William A. Bailey, M.D., in Lawrence, Kansas. Dr. Bailey had seen claimant for other orthopedic problems since 1979. He found a herniated disc at the C5-6 level and referred claimant to neurosurgeon K. N. Arjunan, M.D., in Topeka, Kansas. As a result of that injury, on July 1, 1988, Dr. Arjunan performed anterior cervical discectomy at C5-6 level.

(6) Claimant received a second injury to her cervical spine in 1990 while working for Pence Garden Center in Lawrence, Kansas. She was again seen by Dr. Arjunan who at that time diagnosed a herniated disc at the C6-7 level. In June of 1990, the doctor performed an anterior cervical discectomy this time at the C6-7 level.

(7) Claimant settled a workers compensation claim for the 1990 work-related injury for a lump sum amount of \$14,000 based on a 30 percent permanent functional impairment rating.

(8) After those two surgeries, claimant suffered spasticity in her arms and legs. She was required to take Baclofen, a medication, in an effort to control this spasticity condition. Claimant testified that Dr. Arjunan restricted her from lifting 20 pounds with no activities involving manual dexterity and limited bending activities.

(9) Additionally, before the November 22, 1993, accident, in June 1993, claimant suffered a cervical sprain when she was in training to qualify for a CNA certificate. On July 14, 1993, an MRI study showed a spontaneous fusion at the previous C5-6 discectomy level and a very small disc protrusion at the right C4-5 level.

(10) After the November 22, 1993, accident, claimant returned to work for the respondent. Claimant testified as she continued to work she had tingling and numbness in her arms that she had never experienced before the November 22, 1993, accident. Finally, on May 17, 1994, claimant's arms went completely numb while she was working. The respondent sent her home, and she sought medical treatment with Dr. Bailey.

(11) Dr. Bailey had claimant undergo another MRI examination on June 7, 1994. The radiologist found a small herniated disc fragment in the midline at the C4-5 level causing a slight posterior displacement of the cervical cord.

(12) At that time, Dr. Bailey referred claimant to the University of Kansas Medical Center for a second opinion. Neurosurgeon Paul Arnold, M.D., saw claimant and agreed she had a problem at C4-5 and recommended she have an additional diagnostic study of a CAT scan with contrast.

(13) After claimant left work on May 17, 1994, she did not return to work because her symptoms worsened to a point she could not longer work.

(14) Finally, on April 27, 1995, Dr. Bailey had claimant undergo a cervical CT scan with intrathecal contrast. This scan showed a right paramedian C4-5 disc herniation. Because of claimant's increasing symptoms and her showing no improvement from conservative treatment, on June 9, 1995, Dr. Bailey performed an anterior cervical disc excision and interbody fusion for claimant's symptoms of radicular pain and spinal cord compression.

(15) The last time Dr. Bailey saw claimant for her cervical injury was on December 12, 1995. However, she had remained in contact over the telephone with his office because she continues to need medication for the spasticity in both her upper and lower extremities. The doctor opined that claimant's residual spasticity, pain, and limited movement of neck, resulted in a 15 percent permanent partial impairment to the body as a whole. This 15 percent rating is in addition to a 30 percent functional impairment rating caused by the two previous cervical injuries and surgeries.

Dr. Bailey limited claimant's work activities to half time with a lifting limit of 15 to 20 pounds with no repetitive bending or squatting. He admitted claimant had similar restrictions and symptoms before the November 22, 1993, accident but believed claimant's symptoms increased after the work-related accident. He also testified that in his opinion, claimant's need for the June 9, 1995, surgery was directly related to the November 22, 1993, accident.

Dr. Bailey also acknowledged, although the radiologist reported only a small disc protrusion at C4-5 on the MRI report of July 14, 1993, his medical records indicated a herniated disc at that level. However, Dr. Bailey also recognized claimant returned to work after this incident and did not have increased symptoms until after the November 22, 1993, accident. The doctor went on to testify that the later diagnostic studies, i.e., the April 27, 1995, CT scan with contrast, showed more impressive findings of the herniated disc at the C4-5 level.

(16) Dr. Bailey was the only physician to give an opinion on claimant's loss of ability to perform work tasks she had performed in the 15 years preceding her November 22, 1993, accident. Dr. Bailey reviewed a list of 34 work tasks completed by vocational expert Karen Sherwood after she interviewed the claimant. Dr. Bailey found claimant's current work restrictions prohibited her from performing 13 of the 34 work tasks listed.

(17) On March 13, 1995, at the request of respondent, orthopedic surgeon David K. Ebelke, M.D., of Kansas City, Missouri, examined and evaluated claimant. Dr. Ebelke also testified in this case on May 20, 1997.

Dr. Ebelke found there was no difference between the July 14, 1993, MRI that the radiologist reported had shown a small disc protrusion at C4-5 and the June 7, 1994, MRI where the radiologist reported a disc herniation at C4-5. Dr. Ebelke then concluded the November 22, 1993, accident had produced no new permanent injury. Dr. Ebelke testified that based on his examination of the claimant on March 13, 1995, Dr. Bailey's surgery of June 9, 1995, was not necessary.

(18) At the regular hearing held on December 3, 1996, claimant testified that she remained symptomatic, was receiving social security disability benefits, and had been working half time since January 1996 as a companion for elderly people. She testified she

worked approximately 18 hours per week, earned \$5.25 per hour, and performed some household and cooking duties with opportunity to sit down and rest.

CONCLUSIONS OF LAW

(1) K.S.A. 44-510e(a) defines work disability as an average of the wage loss and work task loss:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

(2) However, K.S.A. 44-510e(a) limits a claimant to functional impairment so long as claimant earns a wage equal to 90 percent or more of the preinjury average weekly wage.

(3) If claimant refused to accept or even attempt to perform reasonably offered accommodated work, the wage of the accommodated job may be imputed to the claimant in the work disability calculation. See Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

(4) Even if accommodated work is not offered, claimant must show she made a good faith effort to find employment. If claimant did not make a good faith effort, a wage will be imputed to the claimant based on evidence in the record as to claimant's earning ability. See Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

(5) The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting. See K.S.A. 44-501(c).

(6) The Administrative Law Judge found claimant sustained only a temporary and not a permanent injury as a result of the November 22, 1993, accident. In making that finding, the Administrative Law Judge primarily relied on respondent's examining physician, Dr. Ebelke's opinions. Dr. Ebelke found from his examination of claimant and claimant's medical treatment records that the July 14, 1993, and the June 7, 1994, MRI studies showed claimant's condition had not changed. Dr. Ebelke then concluded that claimant's

November 22, 1993, accident resulted in only a temporary strain to her cervical spine with no additional permanent functional impairment.

(7) The Administrative Law Judge also found claimant's treating physician, Dr. Bailey, had concluded in July of 1993 that claimant had a herniated disc at the same location of the disc he excised on June 9, 1995.

(8) The Appeals Board disagrees with the Administrative Law Judge's conclusion that claimant's November 22, 1993, work-related accident did not result in a permanent injury. The Appeals Board concludes, when claimant's testimony is considered with the testimony of claimant's treating physician, Dr. Bailey, that claimant's November 22, 1993, accident either herniated the C4-5 disc or permanently aggravated a preexisting herniation at that level.

Claimant testified she was able to return to work after the June 1993 incident with only the preexisting spasticity symptoms in her upper extremities. However, after the November 22, 1993, accident, she had pain and numbness in her upper extremities that she had never experienced before this accident. Finally, claimant testified while she was working on May 17, 1994, both of her arms went completely numb and she was sent home from work by the respondent.

Although Dr. Bailey's medical records indicated claimant's July 14, 1993, MRI examination showed a herniated disc at C4-5, the radiologist report concluded only a small disc protrusion was found at C4-5. Dr. Bailey also testified that the April 27, 1995, CT scan with contrast showed a more impressive disc herniation at the C4-5 level. Additionally, Dr. Bailey testified, that following the November 22, 1993, accident, claimant's condition worsened to the point she required the disc excision and fusion on June 9, 1995. He also opined that the further herniation of the C4-5 disc had a direct relationship to claimant's November 22, 1993, work-related accident.

(9) After claimant left work because of the numbness in her arms on May 17, 1994, she never returned to work for the respondent, and the respondent never offered her a job within her restrictions. Claimant's preinjury restrictions were approximately the same as her post-injury restrictions except for Dr. Bailey's restricting claimant to only half-time work. Claimant found half-time employment within her work restrictions starting January 1996. On the date of the regular hearing, she remained employed working approximately 18 hours per week at \$5.25 per hour earning \$94.50 per week.

(10) The Appeals Board concludes, since claimant was not earning 90 percent or more of her preinjury average weekly wage post-injury, she is entitled to a work disability if it exceeds her permanent functional impairment rating. See K.S.A. 44-510e(a).

(11) The respondent and the Fund argue that if claimant is entitled to a work disability, the work task opinion as expressed by Dr. Bailey is invalid because he did not take into

consideration claimant's preexisting work restrictions which resulted from her previous cervical injuries. The record established that claimant had a preexisting 20 pound lifting restriction before she started working for respondent and respondent accommodated that restriction.

After reviewing Dr. Bailey's testimony in regard to the work tasks claimant performed in the 15 years preceding her accident, the Appeals Board finds claimant retained the ability to perform post-injury the work tasks she was performing preinjury while working for the respondent. The work tasks Dr. Bailey identified claimant was unable to perform in jobs she worked before she was employed by the respondent were those tasks that exceeded the 20 pound lifting restriction. The Appeals Board agrees with the respondent and the Fund that when claimant's preexisting work restrictions are considered then claimant does not have a work task loss.

(12) However, the Appeals Board finds that claimant did suffer a post-injury wage loss. Dr. Bailey testified claimant was only capable of working half time. Therefore, the Appeals Board concludes that claimant had a 68 percent wage loss when claimant's preinjury average weekly wage of \$290.85 is compared with her post-injury average weekly wage of \$94.50.

(13) As required by K.S.A. 44-510e, claimant's work task loss of zero percent is averaged with her 68 percent wage loss equalling a 34 percent work disability.

(14) Respondent and the Fund also argue, if claimant is entitled to a work disability that exceeds the stipulated 15 percent functional impairment, the work disability shall be reduced by the preexisting functional impairment. See K.S.A. 44-501(c).

The Appeals Board concludes that when preexisting restrictions are taken into consideration in determining the injured workers work task lost then the resulting work disability is not further reduced by the preexisting functional impairment. To do so, would result in accounting for the same preexisting condition twice.

By enacting the 1993 amendments to K.S.A. 44-501(c), the Appeals Board finds the legislature intended for injured workers with a preexisting condition to only be compensated for new injuries to the extent the new injury caused increased disability. See Converse v. ADIA Personnel Services, Docket No. 184,630 (December 1996). Accordingly, the Appeals Board concludes that claimant is entitled to permanent partial disability benefits based upon a 34 percent work disability without reduction of the preexisting percentage of functional impairment.

Since claimant returned to work after her November 22, 1993, accident and worked at comparable wage until she left work because of her work-related injury on May 17, 1994, for those 25.14 weeks she is limited to the 15 percent functional impairment. Thereafter, claimant was paid 84 weeks of temporary total disability compensation. Claimant is then

entitled to 92.5 week of permanent partial disability compensation based on a 34 percent work disability.

(15) Claimant is entitled to future medical treatment upon proper application and approval by the Director.

(16) Claimant is entitled to unauthorized medical allowance in the statutory maximum of \$500.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Jon L. Frobish dated March 5, 1998, should be, and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Pamela J. Houk, and against the respondent, Community Living Opportunity, and its insurance carrier, Cigna Workers Compensation, and the Kansas Workers Compensation Fund for an accidental injury which occurred on November 22, 1993, and based upon an average weekly wage of \$290.85.

Claimant is entitled to 84 weeks of temporary total disability compensation at the rate of \$193.91 per week or \$16,288.44, followed by 25.14 weeks of permanent partial disability compensation at the rate of \$193.91 per week or \$4,874.90 for a 15% permanent partial general disability, followed by 92.5 weeks of permanent partial disability compensation at the rate of \$193.91 per week or \$17,936.68 for a 34% permanent partial general disability, making a total award of \$39,100.02.

As of February 25, 1999, the entire award is due and owing in one lump sum less any amounts previously paid.

All authorized medical expenses are ordered paid by the respondent.

The Kansas Workers Compensation Fund has agreed to pay 80 percent of the award.

All remaining orders contained in the Award are adopted by the Appeals Board.

IT IS SO ORDERED.

Dated this ____ day of February 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

In awarding claimant a 34 percent work disability, the majority finds claimant has sustained a wage loss but no task loss. I would find the claimant has also proven a 50 percent loss of task performing ability based upon the testimony of Dr. Bailey that claimant is now limited to only working half time. Thus, even though claimant can still perform all the tasks she was performing before her accident, she can no longer perform them for a full work day. The majority's finding of a 0 percent task loss, when averaged with her actual wage loss of 68 percent, does not fully compensate claimant for her work disability.

BOARD MEMBER

c: Eugene C. Riling, Lawrence, KS
Michael W. Downing, Kansas City, MO
Jeffrey K. Cooper, Topeka, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director